Ting Siu Hua v Dato' Ting Ching Lee and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02(NCvC)-W-1393–07 OF 2019 AND Q-02(NCvC)-W-1397–07 OF 2019
AZIZAH NAWAWI, SEE MEE CHUN AND MOHAMED ZAINI JJCA
4 JUNE 2024

Contract — Illegality — Agreement — Oral contract — Credit lines and rolling rebates provided to gambler — Whether there was binding contract in respect of issuance of lines of credit and rolling rebates — Whether gambling contract could be declared illegal or void before its existence was established — Whether credit lines and rolling rebates provided to a gambler to exchange for gambling chips constituted to gambling debts — Whether credit lines and rolling rebates were loan or credit given to enable gambler to cash them into gambling chips

Tort — Defamation — Facebook and WeChat postings containing page from newspaper advertisement alleging plaintiffs owed monies — Whether defendant was the originator of newspaper advertisement — Whether defendant responsible for republication of advertisement of newspaper on Facebook and WeChat — Whether action for defamation should be allowed

These were two appeals emanating from the decision of the High Court judge ('HCJ') to dismiss the plaintiffs' claim for damages for libel and the defendant's counterclaim for the recovery of credits lines totalling USD1.5m and the refund of the rolling rebates of USD193,800 owed by the first plaintiff to the defendant. The respondents ('plaintiffs') were businessmen in Sarawak, whilst the appellant ('defendant') was a tour agent and a junket who arranged for gamblers to gamble at casinos. In December 2014, one Mr Ting Sing King ('TSK') organised a trip to Cambodia. There were five persons involved in the trip namely, TSK, the first plaintiff, the second plaintiff and third plaintiffs, and one Lee Chew Sing. The first plaintiff, TSK and the others flew to Cambodia for the purpose of gambling at the Naga Casino Cambodia. During their stay in Cambodia, TSK, Dato' Lee Chew Sing and the plaintiffs did gamble at the Naga Casino. Subsequently, the plaintiffs found that in the Facebook account with the username of 'Ani Ta', there was a post containing the photograph of the newspaper page in Mandarin language, purportedly from 'Sin Chew Daily News' newspaper. The purported newspaper page contained a half-page advertisement with following words 'the above three persons have debt owed to our company, you are required to appear personally within one week to resolve it, failing which action according to law would be taken against you and bear the consequences' accompanied by the

passport-sized photographs of the plaintiffs. The plaintiffs also alleged that the defendant had also written and published and/or caused to be written and published in Mandarin language in his WeChat account and/or his agent or servant's WeChat account and on Facebook the same half-page advertisement. The plaintiffs contended that the said words were calculated to disparage and to attack the plaintiffs as to their characters and positions in the general society and business community, both locally and internationally. As a result, the plaintiffs' claimed that their reputations had been seriously injured, and they have suffered anxiety, embarrassment and distress and had suffered losses and damages. Therefore, the plaintiffs commenced a defamation suit against the defendant in the High Court. The defendant, on the contrary, counterclaimed against the first plaintiff in respect of three lines of credits in the sum of USD1m, USD500,000 and rolling rebate of USD193,800 which the defendant claimed was/had been utilised by the first plaintiff for the purpose of gambling at Naga Casino. The HCJ dismissed the plaintiffs' claim and allowed the defendant's counterclaim. Hence, the present appeals.

Held, dismissing the plaintiff's appeals; allowing the defendant's appeal:

(1) The plaintiffs had failed to establish that the defendant was the originator of the *Sin Chew Daily News* newspaper advertisement with the three photographs of the plaintiffs. Also, the witness statement of the first plaintiff did not show that the defendant was the originator or the person who instructed *Sin Chew Daily News* to publish the said advertisement. Further, there was also no evidence adduced by the plaintiffs that the plaintiffs had inquired from the *Sin Chew Daily News* newspaper about who was the originator of that advertisement or the person who instructed *Sin Chew Daily News* to publish that advertisement. As such, the HCJ was not plainly wrong in his decision to dismiss the plaintiffs' action for defamation, based on their failure to prove that it was the defendant who had published the alleged defamatory advertisement in *Sin Chew Daily News* (see paras 22–23 & 25).

(2) The trial judge was not plainly wrong in his decision to dismiss the plaintiffs' circumstantial evidence to establish the fact that it was the defendant who made the impugn publication of the advertisement in *Sin Chew Daily News* and the republication of the same on Facebook and WeChat. As such, the HCJ was not plainly wrong in his finding that the plaintiffs have failed to prove that it was the defendant who was responsible for the publication of the advertisement in *Sin Chew Daily News* and the republication on Facebook and WeChat. Therefore, there was no merit in the plaintiffs' appeal, and the plaintiffs' appeal was dismissed with costs (see paras 30 & 34).

(3) There was no written agreement between the defendant and the first plaintiff over the two lines of credit and the rolling rebates. Therefore, in the absence of a written contract, the issue of whether there was a binding contract that existed between the parties was essentially a question of fact (see para 37).

(4) The HCJ failed to consider the evidence of the defendant, which was corroborated by DW1, that the first plaintiff had requested from him two lines of credits amounting to USD1.5m and the advance rolling rebates of USD193,800. The HCJ did not explain why he did not accept or rejected the evidence of the defendant and DW1. Unless the HCJ had rejected the evidence of the defendant, which was corroborated by DW1, and that their evidence was highly improbable, based on the fact that the first plaintiff was gambling at Naga Casino Cambodia with the chips issued by DW1, the judge was plainly wrong in his decision for not considering and accepting the evidence of the defendant and DW1 that the first plaintiff had an agreement with the defendant to obtain the credit lines for the purposes of gambling chips at the casino (see paras 45 & 47).

(5) Since both the defendant and DW1 gave evidence that it was the first plaintiff who had requested for the two lines of credits amounting to USD1.5m and the advance rolling rebate of USD193,800, and that the gambling chips were personally issued by DW1 to the first plaintiff, the onus lay on the first plaintiff to show that the chips were indeed purchased by TSK and given by TSK to him. Therefore, the first plaintiff should have called TSK to corroborate his evidence that TSK simply gave him the chips for gambling purposes. As such, there was insufficient judicial appreciation of the evidence by the HCJ. This was compounded by the fact that the HCJ made a finding that the gambling contract was illegal in law before he made a finding that there was a contract between the defendant and the first plaintiff (see paras 50–51).

(6) The oral contract between the defendant and the first plaintiff over the two lines of credits amounting to USD1.5m and the rolling rebates of USD193,800 were not gambling debts. The HCJ was plainly wrong in finding that the defendant was attempting to recover gambling debts, that was owed by the first plaintiffs to him. The two lines of credit and the rolling rebates were not gambling debts. They were in the nature of a loan or credit given to the first plaintiff to enable him to cash them into gambling chips. The first plaintiff did not give evidence that he was gambling with the credit lines and rolling rebates. As explained by DW1, the first plaintiff was only gambling at the casino after the issuance of the gambling chips. The gambling debts, if any, would be between the first plaintiff and the casino concerned (see paras 63 & 65).

[Bahasa Malaysia summary

Ini adalah dua rayuan lanjutan daripada keputusan hakim Mahkamah Tinggi ('HMT') untuk menolak tuntutan plaintif bagi ganti rugi untuk libel dan tuntutan balas defendan untuk mendapatkan semula talian kredit berjumlah USD1.5 juta dan pemulangan balik rolling rebates berjumlah USD193,800 terhutang oleh plaintif pertama kepada defendan. Responden ('plaintif') adalah ahli perniagaan di Sarawak, manakala perayu ('defendan') adalah ejen pelancongan dan junket yang mengatur penjudi berjudi di kasino. Pada Disember 2014, seorang Encik Ting Sing King ('TSK') telah menganjurkan lawatan ke Kemboja. Terdapat lima orang yang terlibat dalam perjalanan itu iaitu, TSK, plaintif pertama, plaintif kedua dan plaintif ketiga, dan seorang Lee Chew Sing. Plaintif pertama, TSK dan yang lain terbang ke Kemboja untuk tujuan berjudi di Naga Casino di Kemboja. Semasa berada di Kemboja, TSK, Dato' Lee Chew Sing dan plaintif telah berjudi di Naga Casino. Selepas itu, plaintif mendapati dalam akaun Facebook dengan nama pengguna 'Ani Ta', terdapat satu pautan yang mengandungi gambar halaman akhbar itu dalam bahasa Mandarin, kononnya daripada akhbar 'Sin Chew Daily News'. Halaman akhbar yang dikatakan mengandungi iklan separuh muka surat dengan perkataan berikut 'tiga orang di atas mempunyai hutang kepada syarikat kami, anda dikehendaki hadir sendiri dalam masa satu minggu untuk menyelesaikannya, jika tidak, tindakan mengikut undang-undang akan diambil terhadap anda dan menanggung akibatnya' disertai dengan gambar berukuran pasport plaintif. Plaintif juga mendakwa bahawa defendan juga telah menulis dan menerbitkan dan/atau menyebabkan ditulis dan diterbitkan dalam bahasa Mandarin dalam akaun WeChatnya dan/atau akaun WeChat ejen atau pekerjanya dan di Facebook iklan separuh muka surat yang sama. Plaintif berpendapat bahawa perkataan tersebut diterbitkan untuk memperlekehkan dan menyerang plaintif mengenai watak dan kedudukan mereka dalam masyarakat umum dan komuniti perniagaan, di peringkat tempatan dan antarabangsa. Akibatnya, plaintif mendakwa bahawa reputasi mereka telah tercalar, dan mereka telah mengalami kebimbangan, rasa malu dan kesusahan serta telah mengalami kerugian dan kerosakan. Oleh itu, plaintif memulakan saman fitnah terhadap defendan di Mahkamah Tinggi. Defendan, sebaliknya, membuat tuntutan balas terhadap plaintif pertama berkenaan dengan tiga baris kredit dalam jumlah USD1 juta, USD500,000 dan rolling rebate sebanyak USD193,800 yang didakwa defendan telah digunakan oleh plaintif pertama untuk tujuan berjudi di Naga Casino. HMT menolak tuntutan plaintif dan membenarkan tuntutan balas defendan. Oleh itu, rayuan semasa.

Diputuskan, menolak rayuan plaintif; membenarkan rayuan defendan:

(1) Plaintif telah gagal untuk membuktikan bahawa defendan adalah pencetus iklan akhbar *Sin Chew Daily News* dengan tiga gambar plaintif. Juga, kenyataan saksi plaintif pertama tidak menunjukkan bahawa

defendan adalah pencetus atau orang yang mengarahkan *Sin Chew Daily News* menyiarkan iklan tersebut. Tambahan pula, tiada keterangan yang dikemukakan oleh plaintif bahawa plaintif telah bertanya akhbar *Sin Chew Daily News* tentang siapa pencetus iklan itu atau orang yang mengarahkan *Sin Chew Daily News* menyiarkan iklan tersebut. Oleh itu, HMT tidak secara nyata tersilap dalam keputusannya untuk menolak tindakan plaintif untuk fitnah, berdasarkan kegagalan mereka untuk membuktikan bahawa defendanlah yang telah menerbitkan iklan yang didakwa berunsur fitnah dalam *Sin Chew Daily News* (lihat perenggan 22–23 & 25).

(2) Hakim perbicaraan tidak jelas salah dalam keputusannya untuk menolak keterangan mengikut keadaan plaintif bagi membuktikan fakta bahawa defendanlah yang membuat penerbitan palsu iklan itu dalam *Sin Chew Daily News* dan penerbitan semula yang sama di Facebook dan WeChat. Oleh yang demikian, HMT tidak secara nyata tersilap dalam mendapati bahawa plaintif telah gagal membuktikan bahawa defendanlah yang bertanggungjawab ke atas penerbitan iklan itu dalam *Sin Chew Daily News* dan penerbitan semula di Facebook dan WeChat. Oleh itu, tiada merit dalam rayuan plaintif, dan rayuan plaintif telah ditolak dengan kos (lihat perenggan 30 & 34).

(3) Tiada perjanjian bertulis antara defendan dan plaintif pertama mengenai dua baris kredit dan rolling rebates. Oleh itu, dengan ketiadaan kontrak bertulis, isu sama ada terdapat kontrak mengikat yang wujud antara pihak-pihak pada asasnya adalah persoalan fakta (lihat perenggan 37).

(4) Hakim Mahkamah Tinggi gagal mempertimbangkan keterangan defendan, yang disokong oleh DW1, bahawa plaintif pertama telah meminta daripadanya dua baris kredit berjumlah USD1.5 juta dan rolling rebates pendahuluan sebanyak USD193,800. Hakim Mahkamah Tinggi tidak menjelaskan mengapa beliau tidak menerima atau menolak keterangan defendan dan DW1. Melainkan HMT telah menolak keterangan defendan, yang telah disokong oleh DW1, dan bahawa keterangan mereka adalah sangat mustahil, berdasarkan fakta bahawa plaintif pertama sedang berjudi di Naga Casino Kemboja dengan cip yang dikeluarkan oleh DW1, hakim dengan jelas salah dalam keputusannya kerana tidak mempertimbangkan dan menerima keterangan defendan dan DW1 bahawa plaintif pertama mempunyai perjanjian dengan defendan untuk mendapatkan talian kredit bagi tujuan cip perjudian di kasino (lihat perenggan 45 & 47).

(5) Oleh kerana kedua-dua defendan dan DW1 memberikan keterangan bahawa ia adalah plaintif pertama yang telah meminta dua baris kredit berjumlah USD1.5 juta dan rolling rebate pendahuluan sebanyak USD193,800, dan bahawa cip perjudian telah dikeluarkan secara

peribadi oleh DW1 kepada plaintif pertama, tanggungjawab terletak pada plaintif pertama untuk menunjukkan bahawa cip tersebut memang dibeli oleh TSK dan diberikan oleh TSK kepadanya. Oleh itu, plaintif pertama sepatutnya memanggil TSK untuk mengesahkan keterangannya bahawa TSK hanya memberinya cip untuk tujuan perjudian. Oleh itu, terdapat kekurangan pertimbangan kehakiman terhadap keterangan oleh HMT. Ini ditambah lagi dengan fakta bahawa HMT membuat dapatan bahawa kontrak perjudian adalah salah di sisi undang-undang sebelum beliau membuat dapatan bahawa terdapat kontrak antara defendan dan plaintif pertama (lihat perenggan 50–51).

(6) Kontrak lisan antara defendan dan plaintif pertama ke atas dua baris kredit berjumlah USD1.5 juta dan rolling rebates sebanyak USD193,800 bukanlah hutang perjudian. HMT jelas salah apabila mendapati defendan cuba mendapatkan semula hutang perjudian, yang terhutang oleh plaintif pertama kepadanya. Dua baris kredit dan rolling rebates bukanlah hutang perjudian. Mereka adalah berbentuk pinjaman atau kredit yang diberikan kepada plaintif pertama untuk membolehkannya menunaikannya ke dalam cip perjudian. Plaintif pertama tidak memberikan keterangan bahawa dia berjudi dengan talian kredit dan rolling rebates. Seperti yang dijelaskan oleh DW1, plaintif pertama hanya berjudi di kasino selepas pengeluaran cip perjudian. Hutang perjudian, jika ada, adalah antara plaintif pertama dan kasino yang berkenaan (lihat perenggan 63 & 65).]

Cases referred to

Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619, CA (refd)

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152; [1989] 1 CLJ Rep 321, HC (refd)

Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 MLJ 283; [2002] 7 CLJ 32, HC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 CLJ 503; [1998] 3 MLJ 151 (refd)

Wynn Resorts (Macau) SA v Poh Yang Hong [2019] MLJU 200, HC (folld)

Legislation referred to

Civil Law Act 1956 s 26
Contracts Act 1950 ss 24, 24(a), 31

Appeal from: *Dato' Ting Ching Lee & Ors v Ting Siu Hua* [2017] MLJU 2345 (High Court, Bintulu)

Lim Heng Choo (with Analissa Lim) (Lim & Lim Adv) in Civil Appeal No Q-02(NCvC)-W-1393–07 of 2019 for the appellant.

Bong Ah Loi (with Mekanda Singh Sandhu, Lai Kwong Hui and Boston Ho Teck Howe) (Suhaili & Bong Adv) in Civil Appeal No Q-02(NCvC)-W-1397–07 of 2019 for the appellant.

Bong Ah Loi (with Mekanda Singh Sandhu, Lai Kwong Hui and Boston Ho Teck Howe) (Suhaili & Bong Adv) in Civil Appeal No Q-02(NCvC)-W-1393–07 of 2019 for the respondent.

Lim Heng Choo (with Analissa Lim) (Lim & Lim Adv) in Civil Appeal No Q-02(NCvC)-W-1397–07 of 2019 for the respondent.

Azizah Nawawi JCA:

INTRODUCTION

[1] There are two appeals emanating from the decision of the learned High Court judge to dismiss the plaintiffs' claim for damages for libel and the defendant's counterclaim for the recovery of credits lines totaling USD1.5m and the refund of the rolling rebates of USD193,800 owed by the first plaintiff to the defendant.

[2] For ease of reference, the parties will be referred to in their respective capacities in the High Court.

THE SALIENT FACTS

[3] The plaintiffs are businessmen in Sarawak, whilst the defendant is a tour agent and a junket who made arrangements for gamblers to gamble at casinos.

[4] The defendant was appointed as a promoter by Huang Yu Kiung, who operates his business under the style and name of Huang Group for Naga World Ltd. Pursuant to a joint venture agreement termed as STG Operator Incentive Program Agreement dated 1 March 2014 between Naga World Ltd and Huang Yu Kiung, Huang Yu Kiung is to bring in patrons to gamble at the Naga Casino, Cambodia.

[5] In December 2014, one Mr. Ting Sing King ('TSK') organized a trip to Cambodia. There were five persons involved in the trip, TSK, first, second and third plaintiffs, and Lee Chew Sing.

[6] The first plaintiff, TSK and the others flew to Cambodia from 8 January 2015 to 10 January 2015 for the purpose of gambling at the International Floor at Level 6, Naga Casino Cambodia and they had checked into the Naga Casino Hotel and had left their passports with the hotel.

[7] During their stay in Phnom Penh, TSK, Dato' Lee Chew Sing and the plaintiffs did gamble at the Naga Casino.

[8] On or about 17 January, 2015, the plaintiffs found that in the Facebook account with the username of 'Ani Ta', there was a post containing the photograph of the newspaper page in Mandarin language, purportedly from 'Sin Chew Daily News' newspaper. The purported newspaper page contained a half-page advertisement with following words ('the first said words') accompanied by the passport sized photographs of the plaintiffs: (English translation)

[Photograph of Ting Ching Lee]	[Photograph of Ting Heng Nguong]	[Photograph of Ngu Toh Yi]	A N N O U N C E M E NT
NAME: TING CHING LEE SEX: MALE NATIONALITY: MALAYSIAN PASSPORT NO.: K32026240	NAME: TING HENG NGUONG SEX: MALE NATIONALITY: MALAYSIAN PASSPORT NO.: K26840068	NAME: NGU TOH YIS SEX: MALE NATIONALITY: MALAYSIAN PASSPORT NO.: K30741745	

> The above 3 persons have debt owed to our company, you are required to appear personally within one week to resolve it, failing which action according to law will be taken against you and bear the consequences. Contact number: 012796976.

[9] The plaintiffs also alleged that the defendant had, on or about 18 January 2015 written and published and/or caused to be written and published in Mandarin language in his WeChat account and/or his agent or servant's WeChat account and on Facebook the same half-page advertisement appearing in the 'Sin Chew Daily News' newspaper. This is the second said words.

[10] The plaintiffs took the position that the above words were calculated to disparage and to attack the plaintiffs as to their characters and positions in the general society and business community, both locally and internationally. As a result, the plaintiffs' claim that their reputations have been seriously injured, and they have suffered anxiety, embarrassment and distress and have suffered losses and damages.

[11] Therefore, the plaintiffs had brought a defamation suit against the defendant.

[12] In the High Court, the defendant had counterclaimed against the first plaintiff in respect of three lines of credits in the sum of USD1m, USD500,000 and rolling rebate of USD193,800 which the defendant claim

was/had been utilised by the first plaintiff for the purpose of gambling at Naga Casino, Phnom Penh, Cambodia.

DECISION OF THE LEARNED HIGH COURT JUDGE

*The plaintiffs' claim for libe*l

[13] Having heard the evidence and submission from the parties at trial, the learned trial judge held as follows:

(a) although the plaintiffs' photographs and personal details appeared to be printed in the 'Sin Chew Daily News' that was published through Facebook and WeChat, there was no further evidence produced by the plaintiffs during the trial to convince the court that the said Facebook and WeChat account actually belonged to the defendant and/or the defendant's agents;

(b) the plaintiffs may have adduced the evidence that PW2, PW3 and PW5 who have heard the defendant's alleged admission that he was the person who published the first said words and the Second Said Words at the coffee house at the lobby of Genting Grand but the plaintiffs only pleaded that the defendant allegedly admitted to the same in the coffee house of Genting Grand;

(c) the plaintiffs have never pleaded that the defendant's alleged admission to the said publication had occurred at the lobby of the coffee house of Genting Grand. Added to that, it was never pleaded that the alleged admission was uttered in the presence of PW2, PW3 and PW5;

(d) although the plaintiffs may have tendered witness statements relating to what had transpired at the lobby of the coffee house in Genting Grand, these facts were never pleaded specifically in the re-amended statement of claim;

(e) the plaintiffs had, in the re-amended statement of claim pleaded that the defendant's alleged admission of the publication of the purported defamatory words was through the defendant's phone call to TSK (Ting Sing King) on 17 January, 2015. However, the plaintiffs never called TSK as a witness to testify this version in court;

(f) there was no evidence that the defendant had in fact personally and/or through his agents and/or servants published and/or distributed to the public at large in Bintulu, Sarawak copies of the purported advertisement in the purported 'Sin Chew Daily News' newspaper between 17 January 2015 to 28 February 2015; and

(g) therefore, the plaintiffs had failed to fulfil the third element of defamation, that it was the defendant who had in fact published the alleged defamatory statements to third parties;

The defendant's counterclaim

[14] With regards to the defendant's counterclaim, the learned judge had dismissed the same for the following reasons:

(a) that the defendant's counterclaim for the recovery of the two;

(b) alleged lines of credit totalling USD1.5m and a refund of the rolling rebate of USD193,800 was null, illegal, and void under ss 24 and 31 of the Contracts Act 1950 and s 26 of Civil Law Act 1956; and

(c) that there was no binding contract between the first plaintiff and the defendant in respect of the issuance of the alleged lines of credit and rolling rebates.

[15] The learned judge held that both the plaintiffs and the defendant have not proven their respective claims on the balance of probabilities and therefore both the plaintiffs' claim and the defendant's counterclaim are dismissed and parties are to bear their own costs.

OUR DECISION

[16] It is common ground that an appellate court will not intervene in the decisions of the lower courts unless the trial court was shown to be plainly wrong in arriving at its decision or where there had been no or insufficient judicial appreciation of the evidence. Judicial appreciation of evidence meant that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97).

The plaintiffs' claim for defamation

[17] The plaintiffs' claim for defamation against the defendant was based on the following grounds:

(a) the alleged publication in Mandarin in the alleged Facebook account and/or the defendant's agent or servant's Facebook account appearing at the *Sin Chew Daily News* on 17 January 2015;

(b) that between 17 January 2015 to 28 February 2018, the plaintiffs alleged that the defendant had personally or through his agent or servant published and/or distributed in Bintulu copies of the purported advertisement in *Sin Chew Daily News*; and

(c) that on 18 January 2015, the defendant had published in the Mandarin language and/or his agent or servant WeChat account of the purported advertisement.

[18] It is common ground that in order to succeed in a claim of defamation, the onus is on the plaintiffs to prove:

(i) that the alleged defamatory statements referred to the plaintiffs;

(ii) that the alleged defamatory statements bear defamatory imputations; and

(iii) that there was the publication of the alleged defamatory statements to a third party by the defendant.

(See *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 152; [1989] 1 CLJ Rep 321; and *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283; [2002] 7 CLJ 32.)

[19] With regards to the element (i), the learned judge made the following findings:

> [27] In regard to the first element i.e. that the alleged defamatory statements referred to the plaintiffs, this court found from the evidence adduced that the said first words and the said second words referred to the plaintiffs. This is supported by exhs P4 and P5. Not only were the plaintiffs named mentioned in the statement, but their photographs, gender, nationality, and passport were also inserted and/ or mentioned in the same. The fact that the first and second said words referred to the plaintiffs was also not disputed.

[20] With regards to element (ii), the learned judge made the following findings:

> [28] In respect of the second element that the alleged defamatory statements bear defamatory imputations, this court agreed with the plaintiff that based on the witness statements of PW1, PW2, PW4, and PW5, in particular, in paragraphs A.26, A.17, A.10 and A.20 of those witness statements respectively and the evidence in chief of PW3 and PW5, the first said words and Second Said Words are indeed defamatory. It had certainly created in the mind of the reasonable man who had read or seen the purported advertisement the impressions that the plaintiffs were dishonest and untrustworthy persons; that they have incurred huge debt and had absconded without honouring the debt; and that they were evading the defendant and could not be contacted.

[21] However, the learned judge made a finding that the plaintiffs have failed to establish element (iii), that there was the publication of the defamatory statements to a third party by the defendant:

> [36] Having considered submissions of learned counsel on the plaintiffs' claim, this court found that although the plaintiffs' photographs and personal details appeared to be printed in the purported newspaper that was published through Facebook and Wechat, there was no further evidence produced by the plaintiffs during the trial to convince this court that the said Facebook and WeChat Account actually belonged to the defendant and/or the defendant's agents.

[22] We are of the considered opinion and we agree with the findings of the learned judge that the plaintiffs had failed to establish that the defendant was the originator of the *Sin Chew Daily News* newspaper advertisement with the three photographs of the plaintiffs. The witness statement of the first plaintiff did not show that the defendant was the originator or the person who instructed *Sin Chew Daily News* to publish the said advertisement.

[23] There was also no evidence adduced by the plaintiffs that the plaintiffs had inquired from the *Sin Chew Daily News* newspaper about who was the originator of that advertisement or the person who instructed *Sin Chew Daily News* to publish that advertisement.

[24] In fact in his evidence, the first plaintiff admitted that they did not check with Sin Chiew Daily News:

> Q: You have also alleged that the advertisement was pursuant to the purported Sin Chiew Daily News, did you check with Sin Chiew Daily News, who made that publication?
>
> A: I did not do so.

[25] As such, we are of the considered opinion that the learned High Court judge was not plainly wrong in his decision to dismiss the plaintiffs' action for defamation, based on their failure to prove that it was the defendant who had published the alleged defamatory advertisement in *Sin Chew Daily News*.

[26] The next issue is whether the defendant was responsible for the republication of the advertisement in *Sin Chew Daily News* on Facebook and WeChat.

[27] The learned trial has made a finding that the plaintiffs had failed to establish that it was the defendant who was responsible for the republication of the advertisement in *Sin Chew Daily News* on Facebook and WeChat. This finding cannot be said to be plainly wrong as the first plaintiff himself has admitted in evidence that he has no document to prove that the account holder

of the Facebook and WeChat that republished the impugn photos belonged to the defendant or his agent:

> Q: You have informed the Court that you did check with WeChat whose account it was that published the photograph of you and the other Appellant/Plaintiffs, do you agree that there was no document before the Court to show who was the person you have checked as the account holder in WeChat?
>
> A: Yes, I do not have document.

[28] However, the plaintiffs are relying on circumstantial evidence to prove that that the publication was made by the defendant. The circumstantial evidences relied by the plaintiffs are as follows:

(a) since the defendant was appointed by Huang Yu /Huang Group STG Operator as a junket under the STG Agreement, the defendant has a duty to recover debts owed by punters;

(b) that the plaintiffs had to surrender their passports upon arrival and before entering the casino;

(c) that the defendant has made two phone calls to TSK on 17 January 2015, regarding TSK's account with him. During these calls, the defendant had informed TSK that photographs of the plaintiffs were posted on Facebook and WeChat and advised him to check the newspaper the following day;

(d) that the defendant's action of bringing the Red Door Gang when meeting the first plaintiff at the VIP Spring three private room at Genting Grand; and

(e) that the defendant's admission during the said meeting that he had published the words complained of as defamatory.

[29] It is therefore the submission of the plaintiffs that the circumstantial evidence set out above are sufficient to support an inference that the publication of the words complained of as defamatory were made by the defendant, for the purpose of recovering the alleged debt from the first plaintiff as reflected in the defendant's counterclaim.

[30] We are of the considered opinion that the learned trial judge was not plainly wrong in his decision to dismiss the plaintiffs' circumstantial evidence to establish the fact that it was the defendant who made the impugn publication of the advertisement in *Sin Chew Daily News* and the republication of the same on Facebook and WeChat.

[31] On the alleged admission by the defendant to TSK that he was the person who published the impugn words, TSK did not come to court to confirm the same.

[32] On the alleged admission at Genting Resort, the learned trial judge did not accept the same, as it was not a pleaded case of the plaintiffs that the alleged admission was made at the coffee house at the lobby of Genting Grand. However, it was noted that the pleaded case of the plaintiff was that the defendant allegedly made the admission in the coffee house of Genting Grand. It was also not pleaded that the alleged admission was uttered in the presence of PW2, PW3, and PW5.

[33] Further, there is also an issue of whether the alleged admission was uttered in Hokkien or Foochow. In Hokkien, the plaintiffs have alleged that the defendant had replied that 'he could do bloody well as he liked', whilst in Foochow, it was allegedly stated as 'I did it so what can you do about it'. In any event, either way it cannot be said to be an admission of the publication of the advertisement in *Sin Chew Daily News* and the republication of the same on Facebook and WeChat.

[34] As such, we are of the considered opinion that the learned judge was not plainly wrong in his finding that the plaintiffs have failed to prove that it was the defendant who was responsible for the publication of the advertisement in *Sin Chew Daily News* and the republication on Facebook and WeChat. We therefore find no merit in the plaintiffs' appeal and the plaintiffs' appeal is dismissed with costs.

The defendant's counterclaim

[35] The learned judge made a finding that the defendant's counterclaim was null, illegal and void under ss 24 and 31 of the Contracts Act 1950 and s 26 of Civil Law Act 1956. Subsequently, he made a finding that there was no binding contract between the first plaintiff and the defendant in respect of the issuance of the said lines of credit and rolling rebates.

[36] We are of the considered opinion that the learned judge should have made a finding as to whether there was a binding contract between the parties in the first place, before he can come to a conclusion that such contract is illegal, null and void. This is because if he has made a finding that there is no concluded contract, then there is no necessity for him to make any findings on illegality or nullity based on public policy of such contractual relationship.

Whether there is an oral contract

[37] Therefore the first issue here is whether there is any concluded agreement on the two lines of credit and the rolling rebates. It is common ground that there is no written agreement between the defendant and the first plaintiff over the two lines of credit and the rolling rebates. Therefore, in the absence of a written contract, the issue of whether there is a binding contract that existed between the parties is essentially a question of fact.

[38] In his judgment, learned judge made the following findings:

> [56] This court also found that there was no binding contract between the first plaintiff and the defendant. In the present case, it is the judgment of this court that the alleged contract and/or arrangement between the defendant and TSK pertaining to the granting of the lines of credits and the rolling rebate was a gambling contract and therefore considered as nudum pactum (empty contract) which is unenforceable under s 26(1) of Civil Law Act 1956 (see *Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 2 SLR 412; *Pet Far Eastern (M) 5 Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558; *Jupiters Limited*).
>
> [57] It is the defendant's case that he and TSK had entered into an agreement. From the evidence adduced, Tan Hui Phin (DW1) appeared to be the so-called middle person who dealt with both the defendant and TSK, who the defendant claimed to have acted on behalf of the first plaintiff.
>
> [58] However, TSK was never called to testify to prove if indeed there was an understanding/agreement regarding the issuance of the line of credits and rolling rebate to the first plaintiff.
>
> [59] No doubt, the defendant had produced documentary evidence in exhs D4, D5, and D6, allegedly prepared by Tan Hui Phin (DW1) to show the issuance of the alleged lines of credit and rolling rebates to the first plaintiff and TSK, however, it should be highlighted that it was DW1 who signed in the end column to confirm the alleged issuance of the lines of credit and rolling rebates to the first plaintiff and TSK.
>
> [60] The defendant and Tan Hui Phin (DW1) may have attempted to explain why the first plaintiff did not sign them, but the fact remains that the first plaintiff did not sign them. It could not be said that the first plaintiff was bound to an alleged agreement with the defendant relating to the issuance of the alleged lines of credit and rolling rebates.

[39] In the above analysis and findings, the learned judge has failed to consider the evidence of the defendant and DW1, and the undisputed facts that the first plaintiff and his friends had obtained the credit facilities to gamble at the Naga Casino, Cambodia. The learned judge has failed to consider the following evidence of the defendant:

(a) that on 24 December 2014 in Bintulu, the first plaintiff through his agent, TSK requested a line of credit of USD1m for gambling at Naga Casino Cambodia;

(b) that the defendant has agreed to grant the line of credit to the first plaintiff for a sum for USD1m in Bintulu, as the defendant had known the first plaintiff for over 20 years and had arranged similar credit lines for the first plaintiff to gamble in Singapore and Genting Highland;

(c) that the defendant had also granted a line of credit to TSK for USD50,000, which TSK had fully settled upon his return to Bintulu;

(d) that it was also agreed that the exchange rate be fixed at USD1 to RM3.60;

(e) that the first plaintiff and his friends flew to Cambodia from 8 January 2015 to 10 January 2015 for the purpose of gambling at the International Floor at Level 6, Naga Casino Cambodia;

(f) that on 8 January 2015, DW1 (Tan Hui Phin) of the Huang Group called the defendant when the first plaintiff and TSK had come to Level 6 International Floor of Naga Casino Cambodia to request for their respective chips in accordance with their respective lines of credits;

(g) that on 9 January 2015, TSK requested another line of credit of USD500,000 for the first plaintiff from DW1, who then called the defendant about the said request and the defendant subsequently granted the second line of credit of USD500,000 to the first plaintiff;

(h) that when the first plaintiff's request for the another USD500,000 was rejected, TSK on behalf of the first plaintiff, requested for advance of the rolling rebates of USD193,800. The defendant then agreed and instructed DW1 to release the rolling rebates of USD193,800 on the condition that the first plaintiff would settle the two lines of credits totaling USD1.5m within three months from 10 January 2015;

(i) that at all material time, the first plaintiff and the others were looked after by DW1 at Level 6 International Floor of Naga Casino Cambodia, who was also responsible to record the issuance of casino chips based on the two lines of credits granted to the first plaintiff and a separate line of credit granted to TSK; and

(j) that after utilizing the two lines of credits amounting to USD1.5m and the advance rolling rebates of USD193,800, the first plaintiff had failed and continue to fail to pay the defendant by claiming that the defendant's claim was tainted with illegality and/or null and void and/or against public policy.

[40] The abovementioned evidence of the defendant is supported by DW1, Tan Hui Pin. In his evidence, DW1 said that on 8 January 2015 the plaintiffs and TSK had come to Level 6 International Floor of Naga Casino Cambodia and informed DW1 that the defendant has agreed to the first plaintiff's request for a credit line of USD1m. DW1 said that he had telephoned the defendant in

A the presence of the first plaintiff and TSK. After confirming with the defendant in Bintulu, DW1 had given the chips to the first plaintiff within the line of credit of USD1m.

B **[41]** DW1 added that on 9 January 2015, the first plaintiff had told him that the defendant had granted him another line of credit of USD500,000. Before issuing the chips within the said credit lines to the first plaintiff, DW1 said that he only did so after confirming the same with the defendant.

C **[42]** DW1 also gave evidence that the first plaintiff was physically in front of him when he verified and confirmed with the defendant over the phone about the two lines of credits granted to the first plaintiff before he issued the casino chips to the first plaintiff personally within the credit limits that was agreed.

D **[43]** DW1 added that after utilizing the credit of USD500,000, the first plaintiff informed him that the defendant had agreed to his request for an advance of the rolling rebate of USD193,800. DW1 then called the defendant in Bintulu and after confirming the same with the defendant, DW1 then released the rolling rebate of USD193,800 in the form of casino chips to the E first plaintiff.

[44] This oral testimony of DW1 therefore supports the defendant's evidence that the first plaintiff had utilised the two lines of credits amounting to USD1.5m and rolling rebate of USD193,800, which were later given in the F form of casino chips that was personally issued by DW1 to the first plaintiff at Level 6 International Floor Naga Casino Cambodia, Phnom Penh. The said casino chips were subsequently utilised by the first plaintiff and his friends for gambling at the casino.

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[45] We are of the considered opinion that the learned judge had failed to consider the evidence of the defendant, which was corroborated by DW1, that the first plaintiff had requested from him two lines of credits amounting to USD1.5m and the advance rolling rebates of USD193,800. The learned judge H did not explain why he did not accept or rejected the evidence of the defendant and DW1. It must be emphasized that DW1 gave direct evidence that on 8 January 2015 and 9 January 2015, the first plaintiff came to see him personally about the credit lines and DW1 only released the credit lines to the first plaintiff after confirming with the defendant, who was in Bintulu.

I

[46] Instead the learned judge held that the defendant should have called TSK to testify in order to prove that there was indeed an understanding/agreement regarding the issuance of the line of credits and rolling rebate to the first plaintiff.

[47] However, we are of the considered opinion that unless the learned judge had rejected the evidence of the defendant, which was corroborated by DW1, and that their evidence is highly improbable, we find that based on the fact that the first plaintiff was gambling at Level 6 International Floor of Naga Casino Cambodia with the chips issued by DW1, the learned judge was plainly wrong in his decision for not considering and accepting the evidence of the defendant and DW1 that the first plaintiff had an agreement with the defendant to obtain the credit lines for the purposes of gambling chips at the casino.

[48] In his evidence, the first plaintiff said that TSK was the one who arranged for the trip and had purchased the chips in the casino and distributed to them for gambling purposes, and he had no idea how much was purchased by TSK.

[49] It is common ground that TSK was subpoenaed by the first plaintiff to give evidence. However, despite the fact that a witness statement of TSK was filed by the first plaintiff, subsequently TSK did not come to court to give evidence. The learned judge however held that the defendant should have called TSK to give evidence.

[50] We are of the considered opinion that since both the defendant and DW1 gave evidence that it was the first plaintiff who had requested for the two lines of credits amounting to USD1.5m and the advance rolling rebate of USD193,800, and that the gambling chips were personally issued by DW1 to the first plaintiff, the onus then lies on the first plaintiff to show that the chips were indeed purchased by TSK and given by TSK to him. Therefore, the first plaintiff should have called TSK to corroborate his evidence that TSK simply gave him the chips for gambling purposes.

[51] As such, we are of the considered opinion that there was insufficient judicial appreciation of the evidence by the learned judge. This is compounded by the fact that the learned judge made a finding that the gambling contract is illegal in law before he made a finding that there was a contract between the defendant and the first plaintiff. In *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619, this court held that the appellate court will interfere with the findings made by the court of the first instance where there was insufficient judicial appreciation of the evidence or where the findings do not accord with the probabilities of the case.

Whether the oral contract is illegal, null and void

[52] In view of our finding that there is an oral agreement between the defendant and the first plaintiff on the two lines of credits amounting to USD1.5m and the advance rolling rebates of USD193,800, the next issue is

whether the said contract is null and void premised on s 26 of the Civil Law Act 1956, which provides:

> (1) All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void;
>
> (2) No action shall be brought or maintained in any Court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made;
>
> (3) Subsections (1) and (2) shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime or exercise;
>
> (4) Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by subsections (1) and (2), or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

[53] Section 31 of the Contracts Act 1950 provides as follows:

> (1) Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

[54] Section 24(a) and (e) of the Contracts Act 1950 provides that an agreement is illegal and unenforceable when either the consideration or the object of the agreement is to do an act forbidden by law and the court regards it as opposed to public policy. (see *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151).

[55] Therefore, pursuant to s 26 of the Civil Law Act 1956 and s 31 of the Contracts Act 1950, all agreements by way of gaming or wager shall be null, void and unenforceable. When a contract is made void by a statute, no right or obligation can arise from it and it is deprived of all legal force.

[56] The next issue then is whether the oral contract between the *defendant and the first plaintiff on the two lin*es of credits amounting to USD1.5m and the advance rolling rebates of USD193,800, amounts to gaming or wagering, and is therefore null and void.

[57] In his judgment, the learned judge made the following findings:

> [46] It could be observed from para 4.1 of the defendant's amended defence, paras

21 to 22 of his counterclaim, and his own evidence adduced that he was attempting to recover gambling debts ie the recovery of two alleged lines of credits totaling USD1.5m and a refund of the rolling rebate of USD193,800 allegedly owed by the plaintiffs to by the him.

[47] Having considered submissions of learned counsel on this issue, this court was with the plaintiffs' submissions that the defendant's counterclaim was null, illegal, and void under ss 24 and 31 of the Contracts Act 1950 and s 26 of Civil Law Act 1956.

...

[55] It needs to be emphasised that it is expressly provided by ss 26(2) and (4) of the Civil Law Act 1956 that any suit for recovery of gambling debts would be forbidden in Malaysian Courts.

[58] Learned counsel for the defendant relied on the case of *Wynn Resorts (Macau) SA v Poh Yang Hong* [2019] MLJU 200 for the proposition that the oral contract between the defendant and the first plaintiff on the two lines of credits and the advance rolling rebate do not fall within s 26 of the Civil Law Act 1956 and s 31 of the Contracts Act 1950.

[59] In *Wynn Resorts (Macau)* case, plaintiffs pleaded case is that this is a claim for recovery of monies which are due and owing under a gaming credit facility that was given to the defendant to be utilised for his gambling activity at the plaintiff's casino. As such, there is a finding of fact that the plaintiff's claim is predicated on the Credit Agreement and promissory notes by which the defendant obtained gaming chips worth HK$40m for the purpose of gambling.

[60] In para [96] of the judgment, the learned trial judge, Justice Nantha Balan (now Court of Appeal judge) raised the pertinent issue in that case:

[96] The critical question therefore is whether the credit agreement which facilitated the defendant's gambling activity by way of gaming credit and which then enabled him to be given the requisite number of 'gaming chips' is a 'wagering agreement' which is proscribed by the statutory provisions referred to earlier.

[61] After considering many authorities, Justice Nantha Balan answered the legal issue as follows:

[114] Hence, I agree with counsel's submission that credit — whether it is called gaming credit or otherwise makes no difference — is given in the nature of a loan which has been drawn down and has to be repaid whether or not the borrower has won or lost at the gaming table. Indeed, there is no wager or bet at any time prior to the placing of chips on the gaming table.

[62] Justice Nantha Balan's decision was affirmed by this court in Appeal No W-02(NCC)(W)-184–01 of 2019 and the application for leave to appeal to the Federal Court in Application No 08(f)-192–07 of 2020(W) was dismissed by the Federal Court.

[63] Applying the rationale in *Wynn Resorts (Macau)* case, we are of the considered opinion that the oral contract between the defendant and the first plaintiff over the two lines of credits amounting to USD1.5m and the rolling rebates of USD193,800 are not gambling debts.

[64] DW1 has given evidence that after confirming with the defendant that the first plaintiff is granted to use to use two lines of credits amounting to USD1.5m and the rolling rebates of USD193,800, DW1 then went to cash the two lines of credits and the rolling rebate into gambling chips. It was the gambling chips that the first plaintiff used to gamble at the casino.

[65] We are therefore of the considered opinion that the learned judge was plainly wrong in his finding that the defendant was attempting to recover gambling debts, that was owed by the first plaintiffs to him. The two lines of credit and the rolling rebates are not gambling debts. They are in the nature of a loan or credit given to the first plaintiff to enable him to cash them into gambling chips. The first plaintiff did not give evidence that he was gambling with the credit lines and rolling rebates. As explained by DW1, the first plaintiff was only gambling at the casino after the issuance of the gambling chips. The gambling debts, if any, would be between the first plaintiff and the casino concerned.

[66] For the reasons enumerated above, we allow the defendant's appeal and set aside the decision of the learned judge with regards to the defendant's counterclaim. The defendant's counterclaim is allowed in terms of para 26 of the defendant's counterclaim with costs.

Appellant's appeal allowed; respondents' appeal dismissed.

Reported by K Selvaraju